Mechanalysis Sdn Bhd (in liquidation) v Appraisal Property Management Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCC(ARB)-35–09 OF 2015
MOHD NAZLAN JC
25 MAY 2016

Arbitration — Award — Security for costs — Company law — Winding up — Application to set aside — Proper mode of application to set aside award for security for costs — Whether leave of winding up court required — Powers of High Court to grant order for security — Whether Companies Act 1965 applicable — Arbitration Act 2005

The defendant initiated arbitration proceedings under the Kuala Lumpur Regional Centre of Arbitration ('KLRCA') against the plaintiff for security for costs. The plaintiff counterclaimed against the defendant for the same. The arbitrator ordered the plaintiff to provide security for the defendant's costs in the amount of RM100,000 in respect of the counterclaim but the plaintiff was later wound up by the High Court. In the final award of the KLRCA ('the award'), the arbitral tribunal ordered the plaintiff to pay to the defendant: RM2,648,987.45 ('the sum'); interest on the sum at the rate of 2.5%pa; interest on the sum at the rate of 5%pa; and costs for the KLRCA amounting to RM269,707.60. The plaintiff then filed originating summons ('OS') to set aside the award. The defendant filed two applications against the plaintiff's for security for costs ('encl 8'); and payment of sums into the court made payable by the award ('encl 9'). The plaintiff submitted that the defendant failed to obtain leave of the winding up court pursuant to s 226(3) of the Companies Act 1965 ('the CA').

Held, allowing encls 8 and 9:

(1) Section 226(3) of the CA only applies to proceedings against the wound up company and not in the converse situation, when the company itself commences an action. A determination of whether an action is defensive in nature and thus falls under the scope of s 226(3) of the CA is properly performed by examining if the said action is a direct response to an action commenced by the wound up company in the specific sense that it seeks in the prayer in the said application, reliefs from and in respect of the action initiated by the wound up company. While the instant case did not represent the continuing dispute between the parties, this application, in

terms of what it prayed for, strictly had nothing to do with the results of the KLRCA. Since the application was defensive, s 226(3) was plainly inapplicable (see paras 22 & 26).

(2) Section 42(8) of the Arbitration Act 2005 ('the Act') conferred upon the High Court the requisite powers to grant an order for security of costs as it thinks fit in order to ensure that parties to the arbitral award which makes reference on question of law to the High Court vis a vis the award remains in a position to be able to pay costs to the opposing side should the applicant be adjudged to be ultimately unsuccessful. The application of encl 8 was well within the ambit of the statutory provision in s 42(8) of the Act. The security for costs in the amount of RM45,000 sought by the defendant was reasonable for the court to order (see paras 48 & 55).

(3) The court has the requisite discretion to determine and make an order that the award sum adjudged by the arbitral tribunal to be payable to the winning party be brought into the court or otherwise secured, provided that the exercise of such discretion does not, in any non-consequential fashion, detrimentally affect or prejudice the losing party who is seeking to set aside the arbitration award. It would be appropriate and fair that some security be provided to the defendant in connection with the arbitral award made in its favour and that, in any event, there was a patent lack of evidence as to the exact state of the plaintiff's financial health and the resources at its disposal to provide the security (see para 59).

[Bahasa Malaysia summary

Defendan memulakan prosiding timbang tara di bawah Pusat Timbang Tara Serantau Kuala Lumpur ('PTTKL') terhadap plaintif untuk jaminan kos. Plaintif menuntut balas terhadap defendan untuk perkara yang sama. Penimbang tara memerintahkan plaintif untuk menyediakan jaminan kos defendan berjumlah RM100,000 berhubung dengan tuntutan balas tetapi plaintif kemudiannya digulung oleh Mahkamah Tinggi. Dalam award muktamad PTTKL ('award'), tribunal timbang tara memerintahkan plaintif untuk membayar kepada defendan: RM2,648,987.45 ('jumlah'); faedah ke atas jumlah wang pada kadar 2.5% setahun; faedah ke atas jumlah wang pada kadar 5% setahun; dan kos untuk KLRCA berjumlah RM269,707.60. Plaintif kemudiannya memfailkan saman pemula ('SP') untuk mengetepikan award tersebut. Defendan memfailkan dua permohonan terhadap ini plaintif untuk jaminan kos ('lampiran 8'); dan pembayaran jumlah tersebut kepada mahkamah yang dibuat perlu dibayar oleh award ('lampiran 9'). Plaintif berhujah bahawa defendan gagal mendapatkan kebenaran daripada mahkamah penggulungan menurut s 226(3) Akta Syarikat 1965 ('AS').

Diputuskan, membenarkan lampiran 8 dan 9:

(1) Seksyen 226(3) AS hanya terpakai kepada prosiding-prosiding terhadap

syarikat yang digulung dan bukannya dalam keadaan bertentangan, apabila syarikat itu sendiri yang memulakan tindakan. Penentuan sama ada tindakan tersebut bersifat defensif dan dengan itu terangkum di bawah skop s 226(3) AS dilaksanakan sewajarnya dengan memeriksa jika tindakan tersebut adalah tindak balas secara langsung kepada tindakan yang dimulakan oleh syarikat yang digulung, secara khususnya yang dipohon dalam permohonan tersebut, relif-relif daripada dan berkenaan dengan tindakan yang dimulakan oleh syarikat yang digulungkan. Walaupun kes ini tidak mewakili pertikaian yang berterusan antara pihak-pihak, permohonan ini, dari segi apa yang dipohon, langsung tidak ada kena-mengena dengan keputusan PTTKL. Memandangkan permohonan tersebut adalah defensif, s 226(3) jelas tidak terpakai (lihat perenggan 22 & 26).

(2) Seksyen 42(8) Akta Timbang Tara 2005 ('Akta') memberikan kepada Mahkamah Tinggi kuasa yang diperlukan untuk memberikan satu perintah untuk jaminan kos sebagaimana yang difikirkannya bersesuaian untuk memastikan bahawa pihak-pihak untuk award timbang tara yang membuat rujukan mengenai persoalan undang-undang kepada Mahkamah Tinggi *vis a vis* award kekal dalam kedudukan mampu membayar kos kepada pihak lawan sekiranya pemohon diputuskan akhirnya tidak berjaya. Penggunaan lampiran 8 masih di dalam lingkungan peruntukan statutori dalam s 42(8) Akta. Jaminan kos dalam jumlah RM45,000 yang dituntut oleh defendan adalah munasabah untuk mahkamah arahkan (lihat perenggan 48 & 55).

(3) Mahkamah mempunyai budi bicara yang diperlukan untuk menentukan dan membuat perintah bahawa jumlah award yang diputuskan oleh tribunal timbang tara perlu dibayar kepada pihak yang menang, dibawa ke mahkamah atau sebaliknya dijamin, dengan syarat bahawa perlaksanaan budi bicara tersebut tidak, dalam mana-mana cara selepas itu, menjejaskan atau memudaratkan pihak yang kalah yang memohon untuk mengetepikan award timbang tara. Adalah bersesuaian dan adil bahawa beberapa jaminan diberikan kepada defendan berhubung dengan award timbang tara yang dibuat memihak kepadanya dan bahawa, dalam apa jua keadaan, terdapat kekurangan keterangan yang jelas berhubung keadaan sebenar kewangan plaintif dan sumber yang dia ada untuk dilupuskan bagi menyediakan keselamatan (lihat perenggan 59).]

Notes

For cases on award in general, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 1786–1995.

Cases referred to

CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd and other appeals [2002] 2 MLJ 1; [2002] 2 CLJ 1, FC (folld)

Government of Sarawak v Sami Mousawi-Utama Sdn Bhd [1998] 3 MLJ 820; [1998] 4 CLJ 175, HC (refd)

Haidakota (M) Sdn Bhd v Tan Tiam Chai & Another Appeal [2008] MLJU 654; [2009] 1 CLJ 699, CA (refd)

Keary Developments Ltd v Tarmac Construction Ltd & Anor [1995] 3 All ER 534, CA (refd)

Luminous Crossroads Sdn Bhd v Lim Kong Huat Construction [2001] MLJU 475; [2002] 5 CLJ 100, HC (refd)

Malayan Flour Mill Bhd v Raja Lope & Tan Co [2000] 6 MLJ 591; [2000] 7 CLJ 288, HC (refd)

Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd [2014] 3 CLJ 915, HC (refd)

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316; [2007] 3 CLJ 295, CA (refd)

Mosbert Bhd (in liquidation) v Stella D'Cruz [1985] 2 MLJ 446, SC (refd)

NBC Land Sdn Bhd v Teras Kiara Gemilang Sdn Bhd [2011] 1 LNS 669, HC (refd)

North Plaza Sdn Bhd v United Securities Sdn Bhd [2010] 1 MLJ 631; [2010] 1 CLJ 470, CA (refd)

OCBC Bank Malaysia Bhd v Metroplex Bhd [2013] 1 CLJ 669, CA (refd)

Pasdale Pty Ltd v Concrete Constructions [1995] FCA 642, FC (refd)

Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273, CA (refd)

Skrine & Co v MBF Capital Bhd & Anor [1998] 3 MLJ 649; [1998] 3 CLJ 432, CA (refd)

Taman Sungai Dua Development Sdn Bhd (previously known as Supershine (M) Sdn Bhd) v Goh Boon Kim [1997] 2 MLJ 526, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 11, 37, 37(7), 42, 42(1), (8), (8)(a), (8)(b)

Arbitration Act 1952 (repealed by Arbitration Act 2005) ss 24(3), 37(7)

Companies Act 1965 ss 226(3), 292

Corporation Law [AU] ss 351, 440D1

Courts of Judicature Act 1964 s 3

Rules of Court 2012 O 3 r 1(b), O 23, O 23 r 1, O 45, O 46, O 47, O 48, O 49, O 50, O 51, O 52

Jayanthi Pillay (NJ Pillay & Co) for the plaintiff.

Chen Yun Jin (Shiyamala Devi Manoharan with him) (Wong & Partners) for the defendants.

Mohd Nazlan JC:

INTRODUCTION

[1] This case involves an application by the defendant for security for costs and payment into court of the arbitral sum awarded against the plaintiff following the latter's application to court for the setting aside of the arbitral award.

[2] At the conclusion of the hearing on 11 March 2016, I allowed the applications by the defendant. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

[3] The defendant, as claimant had initiated arbitration proceedings on 2 October 2012 under the Kuala Lumpur Regional Centre of Arbitration, ('KLRCA arbitration') against the plaintiff respondent. The latter responded by filing a counterclaim against the defendant in the same KLRCA arbitration.

[4] The defendant was successful in its application for security for costs where on 26 February 2013, the arbitrator made an order that the plaintiff must provide security for the defendant claimant's costs in the amount of RM100,000 in respect of its counterclaim in the KLRCA arbitration.

[5] On 3 September 2013, the plaintiff was wound up by the High Court on grounds of insolvency.

[6] The final award in the KLRCA arbitration was decided by the arbitral tribunal on or around 21 July 2015, which was substantially in favour of the claimant defendant, whereby the plaintiff respondent was to pay the defendant the following sums pursuant to the award:

(a) the sum RM2,648,987.45;

(b) interest at the rate of 2.5%pa from 2 October 2012 on the said sum of RM2,648,987.45 to 21 July 2015;

(c) interest at the rate of 5%pa from 21 July 2015 on the said sum of RM2,648,987.45 until the date of full realisation; and

(d) costs of the KLRCA Arbitration in the sum of RM269,707.60.

[7] The plaintiff then filed originating summons ('encl 1') dated 27 September 2015, applying to set aside the whole award made by the arbitral tribunal. This was subsequently followed by the plaintiff making an

application on 2 November 2015 under encl 16 to have the originating summons amended by impugning only parts of the award which were unfavourable to the plaintiff.

[8] The defendant then filed the two applications in response to the plaintiff's challenge to the award; first, for security for costs ('encl 8') and secondly for the payment into court the aforesaid sums made payable by the award ('encl 9'). These are the subject matter of the present proceedings before this court.

EVALUATION AND FINDING BY THIS COURT

[9] I shall deal with the key issues relevant to the two applications, in particular those raised by the parties, by first identifying them, then setting out in summarised fashion, the arguments of both parties, to be followed by my discussing the same and finally concluding by highlighting my findings on them.

[10] A primary issue raised by the plaintiff which in my view ought to be dealt with prior to examining the substantive applications is whether the defendant must first obtain leave of the winding up court under s 226(3) of the Companies Act 1965 ('the CA') before it could initiate the current proceedings under encls 8 and 9 against the plaintiff which has already been wound up.

First issue — Whether s 226(3) leave necessary to pursue applications against the plaintiff

[11] The plaintiff argues that these applications under encls 8 and 9 must fail since the defendant has failed to obtain the leave of the winding up court pursuant to s 226(3) of the CA, which reads as follows:

> When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:
>
> (a) by leave of the court; and
>
> (b) in accordance with such terms as the court imposes.

[12] It is evident that the words 'action or proceeding' set out in s 226(3) are pivotal in determining the threshold issue of whether leave is mandatory. The plaintiff correctly referred to the definitions of the terms 'action' and 'proceeding' found in s 3 of the Courts of Judicature Act 1964, which are as follows:

'action' means a civil proceeding commenced by writ or in such other manner as is prescribed by rules or court, but does not include a criminal proceeding. A

'proceeding' means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding.

B

[13] The principal thrust of the plaintiff's contention, in addition to relying on a Federal Court decision in *CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd and other appeals* [2002] 2 MLJ 1; [2002] 2 CLJ 1, is that the original action was initiated by the defendant by way of arbitration proceedings in the KLRCA arbitration. Section 226(3) would apply to arbitration proceedings as well. Whilst the defendant had correctly sought for and obtained leave of the winding up court before it continued with the arbitration proceedings which the defendant had initiated, these present proceedings on the two applications under encls 8 and 9 would constitute new proceedings for which no leave has been secured by the defendant. C D

[14] The plaintiff referred to the following passages from the judgment of the Federal Court in *CGU Insurance Bhd*:

If, however, the proceedings in a court of law are started by a person other than the company, either with the object of fastening a liability on the company or with the intention of escaping a liability in respect of a claim which has not been brought into court by the company itself, the permission of the company judge is required for the institution or the continuance of the proceedings. For instance, if a person files a suit for a declaration that the company owes to him a certain sum of money or that he does not owe the company any sum of money, the permission of the company judge is necessary. If, however, the company has instituted a suit or other proceeding to enforce a claim, any action taken by the defendant or the opposite party by way of defence, or if the company has obtained a decree or order, any defensive action by way of appeal, revision, review or setting aside of an ex parte decree or order, should not require the permission of the company judge. E F G

...

Although we accept that an appeal or an application for security of costs can be construed as a proceeding per se, nevertheless it is essential to determine whether it is a proceeding being instituted or commenced against the company under liquidation in s 226(3) of the Act and that must necessarily depend on whether the said proceeding is in the nature of a defensive action or otherwise. The factual circumstances therefore come into play. H

In the Ipoh suit, the facts show that the appeal lodged by the appellant is not a proceeding intended to fasten liability on the respondent (the company under liquidation) or its assets but is essentially a proceeding commenced or instituted by the appellant with the object of exculpating itself from liability arising out of an action commenced or initiated by the respondent. The appellant is not a claimant as such nor is it a creditor of the respondent. It is not seeking to make any inroads into the assets of the respondent but merely to set aside a liability pinned on it by I

virtue of a successful action brought against it by the respondent. Clearly, the appeal is in the nature of a defensive action. The same must apply to the application for security of costs lodged by the appellant in the Kuala Lumpur suit. In the circumstances, we take the view that the appeal or the application for security of costs does not fall within the meaning of the phrase 'action or proceeding ... proceeded with or commenced against the company' in s 226(3) of the Act.

[15] In essence the law is that leave would not be required if the proceeding against the wound-up company is one in the nature of a defensive action. It is thus the submission of the plaintiff that the plaintiff's originating summons before this court is a clear consequence of an action first initiated by the defendant in the arbitration proceedings. The net effect of the arbitral award was in favour of the defendant, requiring payments be made by the plaintiff to the defendant. Therefore, the defendant's position in this originating summons is not a defensive one, as it seeks to in effect affirm the arbitral award. If the originating summons is decided for the defendant, it will have the effect of the defendant being able to fasten liability on the plaintiff company in liquidation or its assets. The defendant is therefore a claimant seeking to make inroads into the assets of the plaintiff, and in that context cannot be said to be taking a 'defensive action'.

[16] The defendant too relies on the same Federal Court decision in *CGU Insurance Bhd*, in particular the following passages:

In *Humber*, the respondent company was wound up during the pendency of their appeal to the Court of Appeal. The respondent won the appeal and this prompted the appellant to appeal to the House of Lords. The respondent then raised a preliminary objection contending that leave of the winding-up court was necessary before the appellant could proceed with the appeal. In dealing with the said preliminary objection, Lord Davey said this:

I am of opinion that the objection cannot be maintained. It was the respondent who themselves proceeded with the action after the winding up order by prosecuting their appeal in the Court of Appeal and when once an action by the company itself has been proceeded with, there is *no* necessity for the defendants in the action to obtain leave for any defensive proceeding on their part.

[17] Thus in a situation when a wound up company appealed against the winding up order, the defendant's action in appealing against the decision on the appeal filed by the respondent is construed as a defensive action which does not require leave under s 226(3) of the CA. The plaintiff in the instant case also referred to the following parts of the judgment in *CGU Insurance Bhd:*

In *Rahmat Ali*, the Full Bench of the Allahabad High Court had embarked on an exhaustive and comprehensive review of the whole range of options decided in previous cases including *Humber* and *Rawat Raj Kumar* in construing s 171 of the Indian Companies Act (which is in *pari materia* with our s 226(3) of the Act) and

finally came to the following conclusions:

> (17) Whenever a matter comes up before a court and an objection is taken that leave under s 171 Companies Act had not been obtained, the Court has to decide whether it is a suit or other legal proceeding against the company. If the words 'against the company' merely mean that the company is arrayed as the opposite party, as was held by Braund J, permission of the company judge would be necessary whenever any legal proceeding has to be instituted or continued against the company. That this could not be the meaning is obvious from the fact that where the company has come to court and has instituted the proceeding, which it can do without the leave of the company judge, the defendant will be required to take his permission to institute or continue any legal proceeding to defend himself. To hold that would put the defendant in a difficult position and it would be necessary, before he can take any proceeding against the company even by way of defence or to disprove the company's claim or to get some order passed in favour of the company vacated, to take the permission of the company judge.
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> *The words 'against the company' must mean a proceeding where the liability is intended to be fastened on the company or its assets and not a proceeding commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself. It would probably be useful to clarify the position a little further. If a person wants to file a suit to escape liability on the ground that the company's claim against him is unfounded, it is a proceeding against the company, but where the company has started the proceeding, that is, put forward its claim in a court of law, any remedy available by way of defence to escape liability, which the company wants to fasten on him, should not be deemed to be a proceeding commenced or continued against the company* and in such a case, the question whether the claim was put forward or the suit was filed by the company before or after the winding-up order, should make no difference. (Emphasis added.)
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> (18) In [1901] 85 LT 141 (J), Lord Davey said:
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> > It was the respondents who themselves proceeded with the action after the winding-up order, by prosecuting their appeal in the Court of Appeal, and when once an action by the company itself has been proceeded with, there is *no* necessity for the defendants in that action to obtain leave for any defensive proceeding on their part.

[18] The defendant further cites two authorities which specifically mentioned application for security for costs not to be a proceeding necessitating leave under s 226(3) or its equivalent. The first is the case of *OCBC Bank Malaysia Bhd v Metroplex Bhd* [2013] 1 CLJ 669, where the Court of Appeal made the following pertinent observation:

> [11] *McPherson's Law of Company Liquidation* by Andrew R Keay (2nd Ed) (published in 2009 by Thomson Reuters) at p 377 expressed the view that 'there appears to be no distinction drawn between these two terms (action and proceeding). The former is a generic term and means civil litigation for the recovery of individual rights'. The Court of Judicature Act 1964 provides that an 'action

means a civil proceeding commenced by writ or in such other manner as is prescribed by rules of court, but does not include a criminal proceeding' and that a 'proceeding means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding'. Widgery LJ in *Langley Constructions (Brixham) Ltd v Wells* [1969] 1 WLR 503 indicated that the word 'proceeding' should be given a wide meaning. *Nevertheless, 'it has been held that lodging an appeal and applying for security for costs against the company are not proceedings for which leave of the court is required*. (Section 226) does extend to counterclaims, proceedings of a statutory penalty and the process directed against the property of a company such as levying execution or distress, enforcing a garnishee order, starting an action *in rem*, or applying for interpleader relief or establishing or exercising a mortgagee's right pursuant to property legislation as well as arbitration proceedings against the company' (*McPherson's Law of Company Liquidation* by Andrew R Keay (2nd Ed) at p 378). '(Section 226) does not state when leave to proceed will be granted. It is not possible to state exhaustively all of the circumstances in which leave to proceed may be appropriate'.

[19] Secondly, in considering s 440D(1) of the Australian Corporation Law which is similar to s 226(3) of the CA, the Australian case of *Pasdale Pty Ltd v Concrete Constructions* [1995] FCA 642 had this to say:

I should also indicate that, even if the company were still in administration, the respondent would not require the court's leave to pursue its motion for security. In my view, for a respondent to initiate a claim for security for costs during proceedings against it by a company under administration, is not to begin or to proceed with a 'proceeding in a court against the company'.

[20] The defendant thus argued that leave would not be required because its application stems from the plaintiff's action by way of its originating summons to set aside the arbitral award. Based on the above authorities, where a wound-up company like the plaintiff in this instant case had commenced proceedings against another entity, just like what the plaintiff had done in the present case, any application made for security for costs would be an action defensive in nature and is not a proceeding for which leave of court is required under s 226(3) of the CA.

[21] In my view, the legal position of the issue in contention is fairly settled. In the first place, it is apposite that the rationale for s 226(3) of the CA be appreciated, as it was well stated by Seah SCJ for the Supreme Court in *Mosbert Bhd (in liquidation) v Stella D'Cruz* [1985] 2 MLJ 446 in the following terms:

But in our opinion, this practice of the court should be adopted and followed for these reasons, it cannot be disputed that the primary object of winding-up is the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts. And the purpose of the statutory provision is to ensure that all claims against the company in liquidation which can be determined by the cheap and summary procedure available in a

> winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company.

It is well established therefore that the statutory provision is designed to empower the court to interfere with actions and proceedings not with the view to in any manner impeding third party rights, but entirely to preserving the already limited assets of the wound up company for distribution amongst those who may have claims on the same.

[22] Secondly, s 226(3) clearly only applies to proceedings against the wound up company, and not in the converse situation, when the company itself commences an action (see the Court of Appeal decision in *Taman Sungai Dua Development Sdn Bhd (previously known as Supershine (M) Sdn Bhd) v Goh Boon Kim* [1997] 2 MLJ 526).

[23] The Federal Court decision in *CGU Insurance Bhd* referred to by both parties in the instant case is in my view, a clear authority that substantially supports the position of the defendant as the two questions posed for the determination of the Federal Court in that case both concerned the necessity for s 226(3) leave; specifically whether firstly an appeal by a defendant against a decision in favour of a company in liquidation, and secondly, an application by a defendant for security for costs in an action commenced by a company under liquidation, fall within the phrase 'action or proceeding' under s 226(3). The Federal Court firmly answered the two questions in the negative.

[24] The Federal Court had observed that although an application for security for costs could be construed as a proceeding per se, it was however imperative to ascertain whether the application was a proceeding being instituted against the company under liquidation in s 226(3) of the CA, a question which answer would be dependent on whether the said proceeding was in the nature of a defensive action or otherwise. The Federal Court held that on the facts, the application for security for costs filed by the defendant was not a proceeding intended to fasten liability on the respondent or its assets but was essentially a proceeding commenced for the purpose of exculpating itself from liability in the action commenced by the respondent. As such the application was therefore in the nature of a defensive action, and in the circumstances, the security for costs application did not fall within the meaning of the phrase 'action or proceeding … proceeded with or commenced against the company' in s 223(6) of the CA. This decision is undoubtedly an authority for the proposition that an application for security for costs is not deemed as an action against a wound up company necessitating that leave be first obtained under s 223(6).

[25] But this cannot be taken as an absolute rule to be applied in all cases. This is because the circumstances of each case must still be closely scrutinised. The Federal Court in that same case itself made that point clearly in the passage quoted by the plaintiff as referred to earlier in this judgment. The crucial issue is to determine whether the application for security for costs filed by the defendant is a defensive action. The diametrically opposite positions taken by the parties on the same set of facts (the plaintiff arguing it is not and defendant contending it is) is attributed to the different interpretation on what each party considered to be is the originating action relevant to the case. The defendant asserts that the originating summons by the plaintiff was it, and its application for security for costs is therefore defensive in nature vis a vis the summons whilst the plaintiff went beyond the originating summons earlier in time, arguing that the KLRCA arbitration instituted by the defendant was the proceeding that started it all, such that the application for security for costs in the originating summons is merely an action to reaffirm what the defendant had successfully achieved in the arbitration proceedings. It cannot be denied that the KLRCA arbitration was an action by the defendant that sought to and did fasten liability of the plaintiff. But the application for security for costs is commenced in response to the originating summons filed by the plaintiff.

[26] In my view, and in line with *CGU Insurance Bhd*, a determination of whether an action is defensive in nature and thus falls outside the scope of s 226(3) of the CA is properly performed by examining if the said action is a direct response to an action commenced by the wound up company in the specific sense that it seeks in the prayers in the said application, reliefs from and in respect of the action initiated by the wound up company. In the instant case, the application for security for costs is filed vis a vis the originating summons commenced by the plaintiff. The defendant is asking that before the plaintiff proceeds with its originating summons, it must provide security for costs that would address the situation should judgment eventually be given for the defendant. The defendant is not pursuing to fasten liability against the plaintiff by filing the application. The reverse is however true, for it is the plaintiff who seeks to fasten liability on the defendant by commencing the originating summons and the defendant's response in filing the application is properly characterised as a defensive action that seeks to have its own liability exculpated. Whilst the instant case does represent the continuing dispute between the parties, it should be noted that this application, in terms of what it prays for, strictly has nothing to do with the results of the KLRCA arbitration. It is in this context that the question whether an action is defensive so as to bring it out of the ambit of s 223(6) of the CA ought to be evaluated, considering the facts of each case. In the instant case, since the application is defensive, s 223(6) is plainly inapplicable.

[27] I am further fortified in this view by the course of action subsequently pursued by the plaintiff post the KLRCA arbitration, as pleaded in the originating summons, which is that its challenge is now made against only parts of the arbitral award which are unfavourable to the plaintiff, but maintaining those parts in favour of the plaintiff including especially its counterclaim in the KLRCA arbitration in the sum of RM3,690,725.55. I am of opinion that these are nothing but affirmative steps taken by the plaintiff and the originating summons could be thus be justifiably construed as one that attempts to fasten liability on the defendant.

[28] And that is not all. For in the event the plaintiff is adjudged to be successful in this action, the defendant will instead be required to pay the plaintiff the aforesaid sum of RM3,690,725.55. Accordingly the application cannot justifiably be characterised as anything other than being defensive in nature for it is filed to resist the plaintiff's action. Similar considerations in this judgment would apply to the application to secure the award sum under encl 9. As such, both the applications filed by the defendant in encls 8 and 9, respectively cannot be construed as a proceeding or action commenced or continued against the plaintiff that warrants leave of the court pursuant to s 226(3) of the CA be obtained by the defendant.

Security for costs

[29] The defendant's application for security for costs is largely premised on the submission that having a valid and enforceable award in its favour against an insolvent plaintiff who is now in liquidation, the former ought not to be burdened and subjected to defend the action commenced by the plaintiff in the form of the originating summons in the absence of any form of security that will put the defendant in position to recover its costs from the plaintiff should the plaintiff fail in these proceedings.

[30] In support of its case, the defendant made reference to various caselaw authorities such as the Court of Appeal decisions in *Skrine & Co v MBF Capital Bhd & Anor* [1998] 3 MLJ 649; [1998] 3 CLJ 432 and in *North Plaza Sdn Bhd v United Securities Sdn Bhd* [2010] 1 MLJ 631; [2010] 1 CLJ 470, which held that the insolvency of the plaintiff to be an important consideration that fortifies the application, as well as provisions of the Arbitration Act 2005 which clearly contemplate the applications filed by the defendant in the circumstances parties are in presently.

[31] The plaintiff on the other hand tries to convince this court that caselaw authorities establish that ultimately the issue is entirely within the discretion of the court and that in particular impecuniosity alone is not a ground for ordering security for costs. The plaintiff relies on the case of *Sir Lindsay*

Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273, where that great judge Lord Denning MR had said this:

> The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Mr Levy helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court to get rid of a nuisance claim, that, too, would count. The court might also consider whether the application for security was being used oppressively — so as to try stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing that part of the work.

[32] Further, it is submitted that in considering all the circumstances, the court should have regard to the plaintiff company's prospects of success, without going into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (see *Government of Sarawak v Sami Mousawi-Utama Sdn Bhd* [1998] 3 MLJ 820; [1998] 4 CLJ 175).

[33] At the same time, the plaintiff also contended, in conjunction with its argument on the importance of the prospects of success and that all circumstances of the case ought to be evaluated, that the plaintiff's winding up was a direct consequence of the defendant's failure to settle the plaintiff's claim. The winding up proceedings against the plaintiff were commenced by a supplier of the plaintiff who had provided goods and services for the subject matter of the contract between the plaintiff and the defendant. The arbitration proceedings were thus, according the plaintiff, amongst other things, intended to determine whether there was any basis for the refusal to settle the claims by the plaintiff which in turn led to the winding up of the plaintiff. The plaintiff also refers to the decision of the Court of Appeal in *Haidakota (M) Sdn Bhd v Tan Tiam Chai & Another Appeal* [2008] MLJU 654; [2009] 1 CLJ 699 in support of the relevance of the allegation that it was the defendant who caused the winding up of the plaintiff.

[34] The primary sources of law for security for costs are s 351 of the CA and O 23 of the Rules of Court 2012 ('the RC 2012'). Section 351 states as follows:

> Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

Order 23 r 1 provides as follows:

(1) Where, on the application of a defendant to an action or other proceedings in the court, it appears to the court:

(a) that the plaintiff is ordinarily resident out of the jurisdiction;

(b) *that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;*

(c) subject to para (2), that the plaintiff's address is not stated in the writ or originating summons or is incorrectly stated therein; or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

then, if, having regard to all the circumstances of the case, the court thinks it just to do, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just. (Emphasis added.)

[35] It is accurate a proposition to state that the court has the discretion to order security by taking into consideration all the circumstances of the case in order to achieve a balance between ensuring that protection is afforded to a defendant and a legitimate claim by a plaintiff is not stifled. As highlighted by the plaintiff, there are authorities which held that impecuniosity is not a sufficient ground to order security. It is a relevant consideration no doubt, but it may also be evidence supporting the case of the wound up company against the application. This would be where the defendant had played a part, a key one at that, in developments that resulted in the winding up of the plaintiff in the first place. The relevant part of the judgment of the English Court of Appeal in *Keary Developments Ltd v Tarmac Construction Ltd & Anor* [1995] 3 All ER 534 on this point is most instructive and reads as follows:

3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. *The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see Farre v Lacy, Hartland* (7 Co (1885) 28 Ch D 482 at p 485 per Bowen LJ). *But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company* (see *Pearson v Naydler* [1977] 3 All ER 531 at p 537; [1977] 1 WLR 899 at p 906). (Emphasis added.)

[36] It may seem to be an equally accurate a proposition that when the institution of a proceeding is however made by the plaintiff which is a company, caselaws on s 351 suggest a more structured and concise evaluation of the relevant considerations. Gopal Sri Ram JCA (as he then was) in the Court of Appeal in *Skrine & Co v MBF Capital Bhd & Anor* [1998] 3 MLJ 649; [1998] 3 CLJ 432 propounded the test to be applied in determining whether a company ought to be ordered to furnish security for costs in the following terms:

> [1] Section 351 of the Companies Act 1965 provides for a two-stage inquiry into whether security for costs should be awarded where the plaintiff is a company. The first step is for the court to determine whether there is credible evidence that the company will be unable to pay the defendant's costs, and the second is to ascertain whether that evidence supports the belief that the company will be unable to do so.

[37] The Court of Appeal in *North Plaza Sdn Bhd v United Securities Sdn Bhd* [2010] 1 MLJ 631; [2010] 1 CLJ 470 followed the test stated in *Skrine & Co* and further held that the fact that the plaintiff company had been wound-up was sufficient to constitute the believe that the said company would be unable to pay the costs of a successful defendant if so ordered. The following passage from the judgment of Hishamuddin Yunus JCA is of significant relevance:

> [28] In the instant case it is common ground that the respondent company has been wound up by the court. In *Northampton Coal, Iron, and Waggon Company v Midland Waggon Company* [1878] 7 Ch D 500 Jessel MR said (at p 503):
>
> > I should say that the fact of the plaintiff company being in liquidation would be sufficient 'reason to believe' the assets to be insufficient unless evidence to the contrary was given.
>
> Based on the above principle, *and considering that the respondent had been wound-up by the court, there is, therefore, reason then to believe that the respondent would be unable to pay the costs of the appellant if the latter were to be successful in their defence* — unless evidence to the contrary is given by the respondent. The inquiry then would be: has the respondent given any evidence to the contrary? We must say that we are unable to find any credible evidence to the contrary. (Emphasis added.)

[38] These two decisions of the Court of Appeal should be considered as clearly stating the rule that the authorities that held that impecuniosity of a plaintiff may not by itself be a sufficient reason to make an order for security for costs ought to be limited only to personal plaintiffs, and does not extend to corporate plaintiffs in light of s 351 of the CA.

[39] On the affidavit evidence made available however, I do not find any justifiable basis that could suggest that the plaintiff could pay the costs of the defendant if judgment were ultimately given to the defendant. There was nothing of substance in the affidavits pertaining to sources of funding, capital

raising, or availability of assets, not to mention the absence of a satisfactory assurance on the direct issue as to how exactly costs to the defendant would be paid, if required.

[40] In any event, applying the test stated in *Skrine & Co*, it is plain that the defendant has not adduced any credible evidence to the contrary to refute its inability to meet any costs order despite it wound up status, should one be made against it in these proceedings. It is safe to state thus that if the plaintiff does not succeed in this action, the defendant would likely not be able to recover its costs in these proceedings. The argument that success in the very action filed by the plaintiff (including the counterclaim) would avail the plaintiff of funds is not and should not be considered as a satisfactory reason, not least since the issue of the plaintiff being required to pay costs to the defendant would arise only if judgment is given in favour of the defendant in the first place. Thus, this line of reasoning is plainly misconceived. Generally the availability of the source of funds should be evidenced by matters unrelated to the proceedings giving rise to the application for security for costs.

[41] Whilst the inability of the plaintiff to pay has been established, and the application for the security for costs is thus justified, I should add for completeness that this does not mean that other considerations are irrelevant to the evaluation. Thus, despite authorities which held the contrary (that the likelihood of success or weakness of a plaintiff's claim is not a relevant consideration to be taken into account in the exercise of discretion by the court) such as in *Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd* [2014] 3 CLJ 915, I do not agree with the contention of the defendant that the plaintiff's chances of being successful in a claim to be an irrelevant consideration as far as an application for security for costs is concerned. The Court of Appeal in *North Plaza* recognised the same, in the following observation:

> [31] And by reason of what we have already said in our judgment above, we are satisfied that the appellant has merits in their defence, that is to say, the respondent's prospect of success in their originating summons being extremely slim, if not, nil. Indeed, this fact is confirmed by the very fact that we have just allowed the appellant's appeal pertaining to the caveats. *It is a principle of law that the respondent's prospect of success is also a relevant factor (among others) in deciding as to whether or not security for costs ought to be ordered against the respondent* (see *Drumdurno Pty Ltd v Braham* [1982] 7 ACLR 131; and *KD Resources Sdn Bhd v Ng Boon Jieh & Son Realty Sdn Bhd & Anor* [2003] 1 CLJ 333). (Emphasis added.)

[42] In another decision of the Court of Appeal, also delivered by Gopal Sri Ram JCA (as he then was) in *Haidakota (M) Sdn Bhd v Tan Tiam Chai & Another Appeal* [2008] MLJU 654; [2009] 1 CLJ 699, it was crystal clear that the court has wide discretion to order security and there are already established

principles and guidelines upon which the discretion ought to be exercised. His Lordship said this:

> (1) Section 351 of the Companies Act 1965 ('the Act') confers a very wide discretion on the High Court to order a company to provide security for costs in an action brought by it or against it. There are settled guidelines upon which the discretion falls to be exercised. Firstly, the application for security for costs must be made with reasonable promptitude after the issue of the writ. Delay is a good reason for the court to exercise discretion against the parties applying for security. Secondly, an order under s 351 of the said Act should generally not be made where the making of it would be oppressive. This is particularly so in a case where the company has an arguable case. Thirdly, security for costs should not be ordered where there is absence of any mala fide on the part of the plaintiff company in bringing its claim. Special attention should be paid to the balance that should be drawn between exposing an innocent defendant to the expense of defending a claim against the risk of shutting out a plaintiff from ventilating a genuine grievance.

[43] It is therefore an important principle affecting plaintiff company that in an application for security for costs, whilst the key prerequisite that an applicant is required to fulfil is that it appears by credible testimony that there is a reason to believe that the company will be unable to pay the costs of the defendant if it is successful in its defence, the exercise of discretion to determine whether or not security ought to be ordered is to be guided by considerations established by case law authorities.

[44] Apart from the winding up status of the plaintiff which on the authority of *North Plaza* is already a sufficient basis of the belief in the inability of the plaintiff to pay (a point which is not applicable in *Haidakota*), I additionally in any event do not find any justifiable ground to support the contention that the plaintiff had a good prospect of success. The averments in the supporting affidavits of the plaintiff which revolved around the contentions, amongst many others, that the arbitral award was patently unfair to the plaintiff and that it contained a serious error in its interpretation of the underlying agreement and its application of the relevant law, to my mind do not without more mean that the plaintiff has a good prospect of success.

[45] Furthermore, the plaintiff alluded that it finds itself in its present status of being wound up because of the defendants' acts such that it would be oppressive to require the plaintiff, the alleged victim, to be required to furnish security for costs in favour of the party accused of having put it in the position in which it finds itself (see *Haidakota*). I similarly find this contention to be untenable and entirely without merit. This suggestion was not supported by any evidence but merely mentioned once in the submission almost in passing, and as highlighted by the solicitors for the defendant at the hearing, was an allegation not raised previously by the plaintiff, let alone averred in any of the affidavits challenging the application by the defendant in encl 8.

[46] It is further observed that whilst the Department of Insolvency granted consent for the plaintiff's solicitors to continue its representation of the plaintiff, the Department of Insolvency as the official receiver made it clear at the same time that it had no intention of satisfying any order for costs that could be ordered against plaintiff out of the remaining assets of the plaintiff. Whilst such a disclaimer is not binding on this court, I agree that this to a certain extent suggests that the plaintiff could be a nominal plaintiff in this originating summons. This could even be said to fall within the ambit of O 23 r 1(b) as set out above which justifies the order for security where the plaintiff is a nominal plaintiff who is suing for the benefit of some other person. Accordingly, I am of opinion that the plaintiff should be ordered to secure the defendant's costs, so that the actual party who is financing this originating summons could not conveniently evade the obligation to pay costs of the defendant if eventually required to do so.

[47] It should further be observed that the Arbitration Act 2005 ('the AA') itself expressly provides for the court ordering an applicant to provide security for costs should the applicant make reference to the High Court on any question of law arising from the award. Section 42(8)(a) of the AA makes this plain and the relevant parts of which read as follows:

> (1) Any party may refer to the High Court any question of law arising out of an award.
>
> (1A) The High Court shall dismiss a reference made under sub-section (1) unless the question of law substantially affects the rights of one or more of the parties.
>
> ...
>
> (8) On a reference under subsection (1) the High Court may:
>
> *(a) order the applicant to provide security for costs*; or
>
> (Emphasis added.)

[48] It is thus manifest that s 42(8)(a) of the AA is enacted to confer on the High Court the requisite powers to grant an order for security of costs as it thinks fit in order to ensure that parties to the arbitral award which makes reference on question of law to the High Court vis a vis the award remains in a position to be able to pay costs to the opposing side should the applicant be adjudged to be ultimately unsuccessful. In light of the facts and the circumstances of this instant case as highlighted above, the application in encl 8 is thus well within the ambit of the statutory provision in s 42(8)(a) of the AA to justify the order envisaged therein.

[49] It will be readily recalled that the arbitral tribunal had previously in the KLRCA arbitration similarly determined based on evidence before it that the plaintiff was not in a position to pay the costs of the defendant in the KLRCA

arbitration proceedings if so ordered, and thus made an order for security for costs therein. The plaintiff did not provide evidence to suggest that there is any change in circumstances that affects this finding for purposes of the present application in encl 8. This supports the argument that the finding of the arbitral tribunal on the non-ability on the part of the plaintiff to pay costs there could be treated as conclusive for the purposes of this present application at the High Court, consistent with the decision of the High Court in *NBC Land Sdn Bhd v Teras Kiara Gemilang Sdn Bhd* [2011] 1 LNS 669 (albeit it involves an application under s 11 of the AA to the High Court during an arbitral proceeding for a security for costs) where Anantham Kasinather J (as he then was) said thus:

> Secondly, it is reasonable for this court to assume that the arbitration tribunal in denying the plaintiff's claim for security for costs had taken into consideration all the relevant facts and had made findings of fact against the plaintiff causing the arbitration tribunal to reject the plaintiffs' application. This must necessarily be so since the two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which security is sought against a company is the same whether the inquiry is conducted by a court of law or an arbitration tribunal. *To the extent that the findings of fact of the arbitration tribunal on the hearing of the similar application are binding on this court, in my judgment, this court is estopped from considering this application after the arbitration tribunal had dismissed the similar application. The exception would be if there were change of circumstances but none is alleged on the facts of this case.* (Emphasis added.)

[50] Further, neither would the fact that the managing director of the plaintiff having provided a personal guarantee of RM100,000 in adherence to the order of the arbitral panel on 26 February 2013 for security for costs assist the plaintiff in its challenge to the present application by the defendant. As stated earlier, the award gave costs of RM269,707.60 to the defendant, which was palpably more than the RM100,000 provided by the plaintiff. More significantly, despite the said security, the defendant had to commence a separate suit against the managing director of the plaintiff to enforce payment of the said RM100,000 which action is now pending before the magistrates court for adjudication. This state of affairs does little to advance the case of the plaintiff.

[51] As such quite apart from the winding up status of the plaintiff which is already a sufficient basis to make an order for security for costs against the plaintiff, all these other considerations which I have just highlighted constitute further credible evidence that certainly go towards strengthening the belief that the plaintiff would be unable to pay costs of the defendant if ordered, more so as they are not meaningfully refuted by the plaintiff. In the exercise of balancing the interests of the litigants, and having regard to the evidence, I find that it is more than compelling that the outcome ought to be for the order for the security for costs as applied for by the defendant to be granted. For

otherwise, a contrary result could tantamount to a situation where an impecunious plaintiff could successfully argue inability to pay costs as a means of exerting unfair pressure on a more prosperous defendant.

[52] The plaintiff has raised one other objection to the applications by the defendant. It is argued that these are premature as the defendant is by filing these applications is seeking to enforce the award despite not having first registered the arbitral award as required under the AA. The plaintiff relied on cases such as *Malayan Flour Mill Bhd v Raja Lope & Tan Co* [2000] 6 MLJ 591; [2000] 7 CLJ 288 and *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316; [2007] 3 CLJ 295. In the former case, the court held as follows:

> An arbitrator's award unlike an order or judgment of a court, does not immediately entitle the successful party to levy execution against the assets of the unsuccessful party. The award must be converted into a judgment or order of the court before the successful party can levy execution. As such, the defendant's action to issue notice under s 218 of the Companies Act 1965 to the plaintiff without first registering the award under s 27 of the Arbitration Act 1952 was pre-mature.

[53] The fallacy of this argument is that it was premised on the misconceived proposition that an application to seek security for costs (and to secure an arbitral award) constitute enforcement proceedings which would otherwise require prior registration under the AA. It is imperative to note that the RC 2012 sets out the modes of enforcement actions as those prescribed under O 45, each of which is further described in O 46–52 of the RC 2012. Neither action seeking security for costs nor to secure an arbitral award is stated as one of the enforcement proceedings, because clearly neither is. In contradistinction, in the two cases referred to by the plaintiff, the issue was that there was a threat to commence winding up proceedings, a mode of enforcing a judgment, albeit not strictly a form of execution.

[54] As for the amount sought to be given as security, I am mindful of the following observation of the High Court in the case of *Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd:*

> [70] Section 351(1) of the Companies Act 1965 provides in this context that any order for security should make provision for sufficient security. 'Sufficient security' within the said section has been defined to mean that which is neither illusory nor oppressive. It is also stated that while the court must not allow s 351(1) to be used as an instrument of oppression, it must equally not allow an impecunious company to put unfair pressure on a prosperous company (see *Malaysian Civil Procedure 2013* under O 23 at p 319).

[55] I am of the view that the security for costs in the amount of RM45,000 sought by the defendant is reasonable for this court to order, taking into

consideration the complexity of the issues raised and the volume of documents involved. Furthermore, the detailed breakdown of the estimation of costs has been shown in the estimated schedule of costs prepared by the defendant's solicitors. In any event, the plaintiff is seeking to set aside the award of the KLRCA arbitration which is in excess of a substantial sum of RM2.6m. As such, all these factors would thus readily support the conclusion that the said quantum of RM45,000 is neither oppressive nor capable of stifling the action filed by the plaintiff.

PAYMENT OF AWARD SUM INTO COURT

[56] It will be immediately observed that the defendant's application in encl 9, which is in response to the originating summons filed by the plaintiff to set aside the arbitral award is expressly contemplated by specific statutory provisions contained in the AA. Firstly, s 37(7) of the AA provides as follows:

> Where an application is made to set aside an award, the *High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application*. (Emphasis added.)

[57] Section 42(8) of the AA, in addition to providing for the making of an order for the security for costs under item (a), as stated earlier in this judgment, additionally enacts that the High Court may similarly grant an order that any money made payable under an award shall be brought into the High Court or otherwise secured pending the determination of a reference under s 42(1) of the AA. The relevant parts read as follows:

> (1) Any party may refer to the High Court any question of law arising out of an award.
>
> ...
>
> (8) On a reference under subsection (1) the High Court may —
>
> (b) order that any money payable under the award shall be brought into the High Court or otherwise secured pending the determination of the reference.

[58] In *Luminous Crossroads Sdn Bhd v Lim Kong Huat Construction* [2001] MLJU 475; [2002] 5 CLJ 100, Low Hop Bing J (as he then was) examined s 24(3) of the repealed Arbitration Act 1952 which is in *pari materia* with the present s 37(7) of the AA which provides for the authority of the High Court, in the event of an application being made to set aside an award, to order that any money made payable by the award to be brought into the court or otherwise secured pending the determination of the application, stated as follows:

> Section 23(3) of the English Arbitration Act 1950 which is in *pari materia* with our s 24(3) has been considered only once, by the English Court of Appeal in *Alexandria Cotton & Trading Company (Sudan), Ltd v Cotton Company Of Ethiopia, Ltd* [1965]

2 Lloyd's List Law Reports 447. In this case, a dispute on a contract for the sale of cotton between the claimant sellers and the respondent buyers was referred to arbitration where an award of 60,990 pounds 11s 8d was made in favour of the sellers. The buyers then filed a motion in court to remit and set aside the award. As the sellers had in hand on other accounts the sum of 45,000 pounds, the court ordered the buyers to pay the sum of 15,000 pounds, into court as security pending the determination of their application to set aside the award. Lord Denning MR did not elucidate or propound any guidelines or factors which the court must take into account when considering whether or not to exercise its discretion under s 23(3), but said at p 448:

> It does not hurt the buyers to pay it. They have the money, and if they pay it, they can have their motion argued; and on being argued, if they are right, they will get the 15,000 pound back. Therefore, there is no harm to them ... So they are not prejudiced.
>
> The sole factor which His Lordship took into consideration in deciding whether or not to exercise the discretion in s 23(3) is the prejudice which the buyers may suffer if the court orders payment into court of the award sum. The court dismissed the buyers' appeal and security was ordered in the form of payment into court as the buyers would not suffer any prejudice.
>
> ...
>
> Therefore, the crucial issue here is still the exercise of a discretion by reference to the particular circumstances of each individual case and that the court's first consideration is to achieve justice between the parties.

[59] Pursuant to s 42(8)(b) of the AA, the court clearly has the requisite discretion to determine and make an order that the award sum adjudged by the arbitral tribunal to be payable to the winning party be brought into court or otherwise secured, provided that the exercise of such discretion as empowered under the said statutory provision does not in any non-inconsequential fashion, detrimentally affect or prejudice the losing party who is now seeking to set aside the arbitration award. The *raison d'etre* of the provision is to clothe the court with the ability to exercise such powers in appropriate and deserving cases in order to ensure that the losing party who seeks to set aside the arbitral award continue to be able to meet such awards in the event its application is unsuccessful, and that the application is legitimate, and not otherwise frivolously instituted to delay and avoid making payment. In the instant case, it would be appropriate and fair that some security be provided to the defendant in connection which the arbitral award made in its favour and that in any event, as observed earlier, there is a patent lack of evidence as to the exact state of the plaintiff's financial health (apart from the fact of having been wound up) and the resources at its disposal to provide the security.

[60] Nor do I consider the contention of the plaintiff that by making this application under encl 9 to secure the award in court, the defendant is

purportedly attempting to position itself as secured creditor to be of substance. For there should not be any dispute that should the defendant be successful in challenging the plaintiff's originating summons herein, any award sum ordered to be brought into the court pending determination of the reference made to the High Court by the plaintiff under ss 37 and 42 of the AA will plainly revert to the pool of assets of the plaintiff in liquidation, for distribution amongst its creditors, and doubtless to be in the order of priority as stipulated under s 292 of the CA. In other words, securing the arbitral award sum under ss 37(7) and 42(8)(b) of the AA does not in any legitimate fashion have the effect of conferring on the defendant the position of the status of a secured creditor. Any suggestion to the contrary would run counter to well-established jurisprudence on insolvency law in the country.

[61] The argument advanced by the plaintiff that it is not in a position therefore to comply with any order that this court shall make requiring the plaintiff to pay into court the sums awarded to the defendant under the arbitral award is untenable for it cannot be the law that such an order can never be made against a company that has been wound up. The plaintiff is after all the party which instituted the action despite its wound up status and it would not be a proper or justified exercise of discretion of the court in its pursuit to achieve the balance of justice between the parties to decide to deny securing the award sum for a defendant who is forced to defend an action initiated by the wound up plaintiff. This would be especially unwarranted in the instant case since the official receiver has also indicated to the plaintiff that the former would not be in a position to make good any payment obligations in granting its sanction to the plaintiff to proceed with this proceeding.

CONCLUSION

[62] In view of the foregoing reasons, it is my judgment that the defendant has successfully established its case on a balance of probabilities for an order for security for costs and an order for payment of the award sum into court, as applied for by the defendant in encls 8 and 9 respectively, be made against the plaintiff.

Enclosures 8 and 9 allowed.

Reported by Afiq Mohamad